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Supreme Court, U.S.
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No. 02-1500

IN THE

Supreme Court of the United States

HAROLD D. EYL, an individual,
Petitioner,

v.

CIBA-GEIGY CORPORATION, a New York Corporation, NORTHEAST COOPERATIVE, a Cooperative Association, and CITY OF WISNER, a political subdivision,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Despite respondents' attempt to minimize petitioner's injuries (Opp. 8-9), it is undisputed that petitioner Harold Eyl is permanently disabled as a result of exposure to Pramitol. It is also undisputed that neither the manufacturer (respondent Ciba-Geigy) nor the distributor (respondent Northeast Cooperative) took any steps to warn bystanders such as Mr. Eyl of Pramitol's dangers. The only question presented in the petition is whether this Court should grant review of the Nebraska Supreme Court's judgment that federal law immunizes respondents from the liability that a Nebraska jury imposed on them under traditional principles of Nebraska common law.

Part I below explains that respondents' opposition simply underscores the need for review. Part II comments on a brief filed by the United States on May 29, 2003, in response to this Court's invitation in *American Cyanamid v. Geye*, No. 02-367 ("U.S. Br. in *Geye*"). In that brief, the United States reversed its prior position, and opined that a damages claim can, in some circumstances, constitute a preempted "requirement" under 7 U.S.C. § 136v(b). Petitioner believes that the government's position in that regard is incorrect. For present purposes, however, the question is whether this Court should grant review and, on that score, the government's brief in *Geye* supports review here.

I. Respondents' Arguments Demonstrate The Need For Review.

A. Respondents concede that two state appellate courts and the D.C. Circuit have held that a state-law damages claim premised on a defendant's failure to warn of a pesticide's dangers is not preempted by FIFRA. Respondents' main argument against review is that a large majority of federal and state rulings on that question are to the contrary, a point that

petitioner acknowledged. *See* Pet. 14. However, where, as here, there is an undisputed split in authority, and geographical happenstance dictates the rights of the public and the duties of a regulated industry, this Court has not hesitated to grant review of conflicts even where lopsided.

That inclination toward review is particularly pronounced in the preemption area. The Court has granted certiorari where the lower federal courts had unanimously found preemption of state-law tort claims, but at least some state courts had taken a different approach. For instance, in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court granted review and held that many of the plaintiff's state-law claims were not preempted by federal tobacco control legislation, despite the unanimity of lower federal court authority holding all claims preempted. *Id.* at 508 n.2; *but see id.* at 508 n.3 (citing state court authority finding no preemption). Similarly, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Court granted certiorari and held that the plaintiff's claims were not preempted by the federal medical device law, disagreeing in whole or in part with the views of eight federal circuits. And very recently, in *Sprietsma v. Mercury Marine*, 123 S. Ct. 518 (2002), where the Court decided that Congress's use of the term "requirement" in the Federal Boat Safety Act did *not* evince an intent to preempt state tort law, review was granted even though, with the exception of a 1994 Texas Supreme Court decision, all federal and state appellate decisions had held the state-law claims preempted. *See* Br. for Resp. in Opp. at 17 & n.5, in *Sprietsma v. Mercury Marine*, No. 01-706 (U.S. filed Dec. 20, 2001).

Respondents take particular aim at the D.C. Circuit's decision in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), which held that FIFRA does not preempt state-law damages claims. Respondents grudgingly acknowledge that the D.C. Circuit "has not expressly overruled

Ferebee[.]" Opp. 13. They argue, however, that *Ferebee* has been "discredited" by *Cipollone* (*id.* at 12), which respondents view as holding that federal preemption of state regulatory law on a particular subject matter necessarily means that state damages actions regarding that subject matter are preempted as well. *Id.* at 13. That argument does not undermine the circuit split; rather, it assumes the answer to the question presented: whether respondents' view of *Cipollone* controls the interpretation of FIFRA's preemption provision or, rather, whether, viewed in the context of FIFRA's text, purpose, and history, Congress rejected that position and left traditional state-law liability systems intact.

B. Indeed, respondents' position equating direct state regulation and state common law is at odds with *Cipollone* itself. To be sure, in interpreting the Public Health Cigarette Smoking Act of 1969, the Court found preemption of some state-law damages claims, relying in part on the notion that such claims can exert regulatory pressure similar to that of direct state regulation. *Cipollone*, 505 U.S. at 521. However, in construing the preemptive scope of the 1969 Act's predecessor — the Federal Cigarette Labeling and Advertising Act of 1965 — seven members of this Court found *no* preemption of *any* state-law damages actions, despite the Act's preemption of direct state regulation. In so holding, the Court stated that "there is no general, inherent conflict between [express] federal preemption of state [regulatory] warning requirements and the continued vitality of state common-law damages actions[.]" 505 U.S. at 518. That holding effectively embodies petitioner's position that there are significant differences between direct state regulation and state monetary liability and that, depending on the context, Congress may rationally decide to preempt the former while leaving the latter undisturbed. Indeed, this Court has made this point on other occasions as well. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation ...

are significantly more intrusive than the incidental effects of such an award provision. ...Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (same).

In this regard, the position of the United States in *Geye* is particularly puzzling. With almost no analysis, the Solicitor General reflexively relies on *Cipollone* for the proposition that FIFRA must preempt a jury's award of damages if it preempts positive law duties imposed by statute and regulation. U.S. Br. in *Geye* 18-19. However, just a few years earlier, the United States explained, in great detail, that such a conclusion would be "astonishing" in light of FIFRA's text and purpose. *See* Brief *Amicus Curiae* for the United States in Support of Plaintiffs-Appellants in *Etcheverry v. Tri-Ag Service, Inc.*, No. S072524, at 6 (Cal. S. Ct. filed March 1999) (available at www.citizen.org/documents/USEtcheverryBrief.pdf). Then, the government argued that it would be wrong to ascribe to Congress an intent to overrule over a century of state common-law liability for pesticide-related injuries without so much as a word to that effect in FIFRA's text or in thousands of pages of legislative history. *Id.* at 19-31.

In addition, the United States (like respondents) overlooks *Sprietsma*, where the Court held that 46 U.S.C. § 4306 — which preempts state boat laws, regulations, or standards "imposing a *requirement*" — did *not* reach state damages actions, even though it does preempt state positive law. 123 S. Ct. at 527. In so holding, the Court noted that treating the common law and positive law differently is "perfectly rational for Congress" to do. *Id.* The Court explained that "common-law claims," "unlike most administrative and legislative regulations, ... necessarily perform an important remedial role in compensating accident victims." *Id.* Thus, the notion that *Cipollone* stands for the

proposition that state common law and state positive law have the same purposes and thus must always be treated the same for preemption purposes — which is respondents' basic point (Opp. 12-13) — is directly at odds with this Court's most recent tort preemption precedent.[1]

In general, respondents' arguments on the merits are adequately answered by the petition. One point, however, bears further emphasis. Respondents ignore a key indicator of Congressional intent — FIFRA's *anti*-preemption provision, 7 U.S.C. § 136v(a). Under it, a state can ban or restrict use of any FIFRA registered pesticide, and it can do so for any reason. Thus, for instance, even if the ban on chlordane under Iowa Code Ann. § 206.32 were based, in whole or in part, on Iowa's conclusion that manufacturers do not label chlordane in a manner that allows it to be used safely, that ban would still be explicitly authorized by section 136v(a). That being the case, a suit for damages under state common law based on the same improper labeling theory — a far less drastic remedy than an outright ban — cannot be preempted.

C. The petition explains (at 17-19) that this case presents another important split in appellate authority — whether section 136v(b)'s preemption of state "labeling and packaging" extends so far as to preempt damages claims that seek non-label warnings directed to individuals who did not apply the pesticide and were therefore not within the label's target audience. *See New York State Pesticide Coalition v.*

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[1]Academic commentary has noted that many lower courts have misapplied *Cipollone* beyond its context, resulting in a failure to analyze FIFRA's text, structure, and purpose on their own terms. *See* Brief of The Natural Resources Defense Council, et al., as *Amici Curiae* in Support of Petitioner [Eyl] ("NRDC Br."), at 6 n.2 (filed May 30, 2003) (citing articles).

Jorling, 874 F.2d 115, 119 (2d Cir. 1989) ("FIFRA 'labeling' is designed to be read and followed by the end-user."). The jury's verdict in this case was based on respondent Ciba-Geigy's duty under Nebraska law to warn distributors and the public, such as petitioner, through non-label means, including sign postings, brochures, and newspaper articles. Similarly, the jury found that respondent Northeast Cooperative was under a duty to warn its customers or the public by supplying post-its, flags, and other non-label warnings.

Petitioner Eyl maintains that this state-law duty is not preempted by FIFRA for two reasons: First, such warnings are not "labeling" under FIFRA, which limits that term to the product label and written information accompanying the product. 7 U.S.C. § 136(p).[2] Second, FIFRA regulates the relationship between the manufacturer and the user (the pesticide applicator). It does not regulate the relationship between manufacturers and distributors, on the one hand, and bystanders, on the other. Thus, whatever the scope of FIFRA preemption, it does not extend to a relationship over which Congress has not exercised substantive regulatory authority. *Cf. Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (no preemption where agency has not exercised regulatory authority over matter in question); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (to oust state law on the basis of an agency's failure to exercise regulatory authority would improperly "leave behind a pre-emptive grin without a statutory cat"). Put differently,

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[2]The United States acknowledges that the kinds of non-label warnings at issue here are not "labeling" under FIFRA. *See* U.S. Br. in *Geye* 11 ("Magazine advertisements, as well as many types of brochures, are not within FIFRA's express definition of 'labeling.'"); *see generally* Responsive Brief [of the City of Wisner] in Support of Writ ("Wisner Br.") (filed May 2, 2003) (explaining in detail that Mr. Eyl's case was unrelated to the Total Kill label).

although bystanders such as Mr. Eyl are foreseeable plaintiffs, FIFRA labeling is not read by, and is not intended to be read by, such bystanders. *See* Wisner Br. at 1 ("This was never a label case. This was a case about warning people that aren't going to use the label.").[3]

Respondents have two retorts. First they say that requiring non-label warnings would undermine EPA's "uniform" labeling approval process. Opp. 18. Not so. A label tells the *applicator* how to safely mix and apply the product. It does not tell members of the public how and under what circumstances to avoid dangerous chemicals. Assume that one or both respondents had posted warnings saying "DANGEROUS CHEMICAL PRESENT: STAY OFF PREMISES UNTIL [DATE]." That warning would not, of course, constitute labeling under FIFRA. More fundamentally, that warning would not conflict with — in fact, it would not have anything to do with — the information on the product label. Indeed, this Court has rejected a preemption challenge to a municipal ordinance that required, among other things, a similar point-of-application warning. *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597 (1990); *see Macrie v. SDA Biotech Corp.*, 630 A.2d 805, 813 (N.J. Super.) (explaining that *Mortier* demands conclusion that FIFRA does not preempt bystander claims seeking off-label warnings), *certification denied*, 636 A.2d 522 (N.J. 1993).

Second, respondents try to distinguish two court of appeals' decisions that directly conflict with the decision below: *Chemical Specialties Manufacturers Ass'n v. Allenby*,

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[3]As noted in the petition (at 18), and as conceded by respondents' silence, the ruling below would bar an action by a two-year-old child injured by Pramitol while playing at River Park, just a surely as it abrogated the verdict in favor of Mr. Eyl.

958 F.2d 941, 946 (9th Cir.), *cert. denied,* 506 U.S. 825 (1992), and *Jorling*, 874 F.2d 115, 119 (2d Cir. 1989). Respondents claim that these cases stand only for the proposition that states may require pesticide *users* to inform bystanders of pesticide use. Opp. 16. That is simply not accurate. Both cases broadly ruled that state-law pesticide warnings by means other than the product label are not preempted because they are not "labeling" under FIFRA. *Allenby*, 941 F.2d at 946-47; *Jorling*, 874 F.2d at 119. Moreover, in *Allenby* —with which the Nebraska Supreme Court below acknowledged conflict (Pet. App. 27a) — the state statute at issue explicitly required "*manufacturers* of products containing the listed substances [to] provide adequate warnings" to the public. 958 F.2d at 942 (emphasis added); *accord Macrie*, 630 A.2d at 811-13 (FIFRA does not preempt claims against pesticide manufacturers by non-applicators, following *Allenby* and *Jorling*). That is why, in *Allenby*, the chemical *manufacturers* association brought suit seeking a preemption ruling. And, while it is true that the statute in *Jorling* applied to pesticide applicators, that hardly undermines Mr. Eyl's position or the conflict in authority here. The no-preemption ruling in *Jorling* was not premised on the identity of the person upon whom the duty to warn was imposed, but rather, as noted, on the conclusion that point-of-application warnings are not "labeling" under FIFRA — exactly the opposite conclusion from the one reached by the Nebraska Supreme Court below. *See* Pet. App. 22a-23a.[4]

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[4]In *Geye*, the Solicitor General has explained that the issue whether non-label forms of warning are preempted by FIFRA "present[s] questions of federal law that have themselves divided the federal courts of appeals," *and* he has cited the decision of the Nebraska Supreme Court below as evidence of that division. U.S. Br. in *Geye* 15. *See also* NRDC Br. 2-7 (explaining in detail how conflicts in authority on various FIFRA preemption issues have led to legal confusion and disparate results in similar cases).

(continued...)

II. The Position Taken By The United States In *Geye* Supports Review Here.

As noted at the outset, the Solicitor General has done an about-face on the question whether section 136v(b) reaches state damages actions. The government's position should only be accorded the weight that its persuasive power deserves (*see* Pet. 17), and, if review is granted here, petitioner will show that it is the government's prior position — not its current one — that best comports with FIFRA's text, structure, and purpose. *See generally* Brief *Amicus Curiae* for the United States in Support of Plaintiffs-Appellants in *Etcheverry v. Tri-Ag Service, Inc.*, No. S072524, at 9-33 (Cal. S. Ct. filed March 1999) (available at www.citizen.org/documents/USEtcheverry Brief.pdf).

The key question now, however, is whether the Court should grant review and, on that score, the government's position in *Geye* supports Mr. Eyl's position for several reasons:

• Despite the government's new-found view, it specifically acknowledges that there is a split in authority on the question whether damages actions are expressly preempted by FIFRA. U.S. Br. in *Geye* 17 n.4.

• The government agrees with petitioner Eyl that, regardless of the scope of FIFRA preemption, under the

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[4](...continued)
Respondents' assertion (Opp. 14) that the Eighth Circuit's decision in *Netland v. Hess & Clark*, 284 F.3d 895 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 315 (2002), presented the identical question to that presented here is not correct. *Netland* concerned personal injuries to a pesticide *applicator*, not a *bystander* like Mr. Eyl.

unanimous views of the Justices in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-92 (1996), a tort action claiming injury from a pesticide is not preempted to the extent that it relies on a state-law duty that is consistent with federal requirements. U.S. Br. in *Geye* 13. As explained in the petition (at 28-30), the Nebraska state-law duty to warn upon which petitioner relied below is fully consistent with FIFRA.

• Finally, in concluding that *Geye* was not an appropriate case for review (*see* U.S. Br. in *Geye* 9-16), the Solicitor General ended his brief by reminding the Court that "the petition in *Eyl* seeks review of a final judgment," and that it "presents the question whether, and to what extent, FIFRA preempts state-law damage actions." *Id.* at 19 & n.5. In doing so, the government has suggested, in not-so-subtle terms, that *this* petition *is* the proper vehicle for addressing FIFRA preemption questions that have vexed the federal and state courts for many years.

CONCLUSION

The petition for a writ of certiorari should be granted.

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